Md Salim bin Hj Abdul Wahab (as executor of estate of Haji Abdul Wahab bin Haji Sutan Hamzah) v Syuen Corp Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-22-662 OF 1998
KAMALANATHAN RATNAM J
22 JUNE 1999

***Contract** — Breach — Sale of land — Defendant led plaintiff to believe that upon approval of state authority, sale would proceed — Defendant terminated agreement due to delay — Plaintiff claimed for premium paid to state authority and damages — Whether defendant must be estopped from denying plaintiff its claim*

The plaintiff entered into a sale and purchase agreement with the defendant on 27 April 1996 for the sale of a piece of land. There were four conditions precedent under the agreement, one of which was that the state authority's approval was to be obtained for the renewal of the leasehold to the land. The plaintiff had complied with all the conditions precedent and paid a premium of RM333,722 to the state authority for the renewal of the leasehold. The defendant then informed the plaintiff that they no longer wished to proceed with the purchase of the property due to the delay in the whole transaction. The plaintiff filed an application, seeking, inter alia, for: (i) an order that the defendant pay to the plaintiff the amount of RM333,722 paid to the state authority for the premium; and (ii) damages in addition or in lieu of specific performance. The defendant did not file any affidavit in rebuttal.

Held, allowing the application:

The conduct of the defendant was totally inequitable. The defendant must be estopped from denying the plaintiff its claim as, by a course of continuous conduct, the defendant had led the plaintiff to believe that it would honour its part of the bargain. The plaintiff went through the trouble of complying with all four conditions precedent stipulated in the agreement. It was clearly an implied term that the state authority's approval was to be obtained for the renewal of the leasehold, thereafter the premium had to be paid. The plaintiff's conduct throughout had been irreproachable, whilst that of the defendant, reprehensible (see p 198B–C).

[Bahasa Malaysia summary

Plaintif memasuki suatu perjanjian jual beli dengan defendan pada 27 April 1996 untuk jualan sebidang tanah. Terdapat empat syarat-syarat duluan di bawah perjanjian tersebut, salah satu daripadanya adalah bahawa kelulusan pihak berkuasa negeri hendaklah diperolehi untuk pembaharuan pegangan pajak tanah tersebut. Plaintif telah mematuhi semua syarat-syarat duluan dan

membayar premium sebanyak RM333,722 kepada pihak berkuasa negeri untuk pembaharuan pegangan pajak tersebut. Defendan memberitahu plaintif bahawa mereka tidak lagi berhajat untuk meneruskan dengan pembelian harta tanah tersebut disebabkan kelewatan di dalam keseluruhan transaksi tersebut. Plaintif memfailkan suatu permohonan, meminta, antara lain, untuk: (i) suatu perintah bahawa defendan membayar kepada plaintif jumlah sebanyak RM333,722 yang telah dibayar kepada pihak berkuasa untuk premium tersebut; dan (ii) ganti rugi sebagai tambahan atau sebagai ganti kepada pelaksanaan spesifik. Defendan tidak memfailkan apa-apa afidavit untuk mematahkan tindakan plaintif.

Diputuskan, membenarkan permohonan:

Kelakuan defendan adalah sama sekali tidak berekuiti. Defendan mesti diestop daripada menafikan plaintif daripada tuntutannya memandangkan, melalui siri kelakuan berterusan, defendan telah menyebabkan plaintif untuk mempercayai bahawa ia akan mematuhi obligasinya kepada persetujuan tersebut. Plaintif telah mengalami kesusahan untuk mematuhi semua empat syarat-syarat duluan yang ditetapkan di dalam perjanjian tersebut. Adalah jelas bahawa adalah suatu terma tersirat bahawa kelulusan pihak berkuasa hendaklah diperolehi untuk pembaharuan pegangan pajak tersebut, kemudian premium mesti dibayar. Kelakuan plaintif sepanjang masa adalah tiada cacat cela, manakala kelakuan defendan, patut dikeji (lihat ms 198B–C).]

Notes

For cases on breach generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1611–1693.

Legislation referred to

Rules of the High Court 1980 O 14, O 81

M Nagarajah (*Karen De'Alwis* with him) (*Shook Lin & Bok*) for the applicant.

SK Han (*Han & Co*) for the respondent.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

One Haji Abdul Wahab bin Haji Sutan Hamzah ('the deceased') is the registered proprietor of all that piece of land held under HS(D) 77939, PT Nos 157, 158, 159, 160 and 161 in the Mukim of Kuala Lumpur, in the District of Kuala Lumpur, Wilayah Persekutuan ('the property').

The deceased died intestate and the plaintiff with the consent of all the beneficiaries of the estate of the deceased, was appointed as the administrator for the estate of the deceased on 1 March 1989.

The plaintiff entered into a written sale and purchase agreement ('the sale agreement') with the defendant on 27 April 1996 for the sale of the property at a purchase price of RM2.7m only ('the purchase price'). The property is a leasehold property and the lease to the property expired in 1996.

Under the sale agreement, the conditions precedent are as follows:

(a) That the state authority's approval is to be obtained for the renewal of the leasehold to the property for a further term of 99 years and that the plaintiff had received notification of the same.

(b) That the sanction of the High Court ('the order') is to be obtained for the sale of the property by the plaintiff to the defendant.

(c) That a title to the property ('the new title') is to be available to effect the transfer from the plaintiff to the defendant.

(d) That possession of the property is to be delivered by the plaintiff to the defendant simultaneously as the execution of the sale agreement, and that the defendant be granted a limited power of attorney ('the licence') to develop or erect a building containing a showroom on the property.

The plaintiff had complied with all the conditions precedent stated herein.

In the conditional approval, the state authority had agreed to renew the leasehold to the property provided that all the conditions stipulated thereunder were fulfilled, among which was that a sum of RM333,722 ('the premium') was to be paid to the state authority within three months from the date of the conditional approval expiring on 17 November 1997.

The plaintiff had applied for and had obtained an extension of time from the state authority to pay the premium on or before 17 February 1998. The premium had to be paid to the state authority before the new title could be issued.

Clause 5 of the sale agreement states, inter alia, that the defendant agrees to advance to the plaintiff the amount required for the settlement of the premium, which said advance should be deducted from the balance purchase price of RM2,430,000 ('the balance purchase price').

The defendant was notified of the premium payable to the state authority and was requested by the plaintiff to help settle the same. However, the defendant did not forward any payment.

Case for the plaintiff

In order to avoid the conditional approval from lapsing and in pursuit of fulfilling the condition precedent under the sale agreement for the issuance and availability of the new title to the property, the plaintiff took his own initiative to look for and obtain the necessary funds to settle the payment of premium to the state authority.

A The plaintiff paid the premium amounting to RM333,722 to the state authority on 16 February 1998 and the new title to the property was issued on 15 April 1998.

The defendant has from the date of the sale agreement, taken possession of the property and has been occupying and continues to occupy
B the property without the plaintiff's consent, but has not paid the balance purchase price to the plaintiff.

Clause 3(b) of the sale agreement states that the defendant should pay the balance purchase price within three months ('the completion period') from the date the new title is issued by the state authority. In the event that the defendant is unable to pay the balance purchase price within the
C completion period, the plaintiff should grant to the defendant an extension of one month ('the grace period') to pay the balance purchase price with interest at the rate of 10% per annum with daily rests until the date of actual payment ('the interest').

The new title was issued on 15 April 1998 and therefore, the balance
D purchase price was to be paid on or before 14 July 1998.

By a letter dated 3 July 1998, the plaintiff's solicitors had informed the defendant's solicitors that the balance purchase price was due and payable by the defendant before the expiry of the completion period. In spite of numerous reminders no payment was forwarded by the defendant to the
E plaintiff.

On 21 July 1998, the plaintiff's solicitors received a letter from the defendant's solicitors which enclosed a copy of the facsimile transmission received by the defendant's solicitors from the defendant informing that they no longer wished to proceed with the purchase of the property due to the delay in the whole transaction and to the present economic situation.
F

In response to the said letter from the defendant's solicitors, the plaintiff's solicitors wrote a letter to the defendant's solicitors on 6 August 1998 informing that the conditions precedent under the sale agreement have all been fulfilled and that the defendant is under an obligation to pay the balance purchase price according to the terms of the sale agreement on
G or before 14 August 1998 together with the interest accruing on the balance purchase price, failing which, the plaintiff would bring a cause of action against the defendant for specific performance of the sale agreement.

The application

H The plaintiff then took out this application (encl 4) pursuant to O 81 and O 14 of the Rules of the High Court 1980 for the following reliefs:

(1) an order for specific performance of the sale and purchase agreement dated 27 April 1996; and/or alternatively;

I (2) that rental be charged and paid by the defendant on the property at RM2 per square feet, where the property is approximately 10,297 square feet in total, on a monthly basis from the date of the said sale and purchase agreement until the date of full settlement thereof;

(3) that the defendant pay to the plaintiff the amount of RM333,722 paid to the State Authority for the premium;

(4) damages in addition or in lieu of specific performance;

(5) costs; and

(6) further or other relief that the court deems fit and proper.

The plaintiff filed an affidavit in support of the said application. Both were dated 16 December 1998.

Subsequent events

An affidavit of service filed by a clerk of the plaintiff's solicitors shows that both the writ and the amended statement of claim had been served on the defendant. Another affidavit filed by another clerk of the plaintiff's solicitors shows that encl 4 and the supporting affidavit had been served on the defendant's solicitors by AR Registered post on 9 January 1999. A memorandum of appearance whilst dated 14 December 1998 was only filed by the defendant's solicitors on 15 February 1999. The defendant's solicitors then filed an affidavit in reply (encl 10). Whilst encl 10 was affirmed on 2 February 1999 it was only filed on 15 February 1999. The plaintiff's solicitors, on being served earlier with an unsealed copy of the affidavit, quickly replied by objecting to the defendant's affidavit in reply as being well out of time.

On 2 February 1999 when encl 4 first came up before me, Mr M Nagarajah for the plaintiff pointed out that the defendant was out of time in his reply. The court then granted an adjournment for the defendant to file an application to obtain leave to file the affidavit out of time. Counsel for the defendant, Mr SK Han, was present.

When the matter next came up on 2 March 1999, Mr Han was absent. I stood down the matter to 10am. When the matter was called up at 10 am Mr Han was again absent. I then struck out his application for leave to file the affidavit out of time which was for hearing on 2 March 1999. I then fixed the hearing of encl 4 to 12 April 1999.

On 12 April 1999 in spite of my pointing out to Mr Han the implication of proceeding without a reply, Mr Han insisted on proceeding without an affidavit in reply.

Court's findings

Mr Nagarajah then informed the court that in respect of encl 4, he was only proceeding with prayers (3), (4), (5) and (6) and that he was abandoning prayers (1) and (2). He rested his case on his affidavit in support which was an averment of the facts as narrated by me. To my amazement Mr Han also contended that he too was relying on the plaintiff's affidavit filed in support of this application.

What Mr Han ought to have said was that he was relying on exh MS-2 being the sale and purchase agreement dated 27 April 1996 which was

annexed to the plaintiff's affidavit in support, and ought not to have said that he was relying on the plaintiff's affidavit.

Relying on cl 6 which dealt with the termination of the agreement, Mr Han submitted that the agreement had been terminated due to the failure of the purchaser to pay the balance of the purchase price and in consequence thereof all that the plaintiff was entitled to, was to forfeit the deposit of RM270,000. Therefore I was urged to reject the claim made under prayer (3) of encl 4 being the sum of RM333,720 paid by the plaintiff to the state authority for the premium.

With regard to prayer (4) being a claim for damages, Mr Han argued that this was only available if the plaintiff was entitled to specific performance. In this case since there was a right to terminate pursuant to cl 6 of the sale and purchase agreement Mr Han contended that there was no right to specific performance and hence no right to damages. I then enquired of Mr Han if it was his case that in respect of prayer (3) he was merely disputing the plaintiff's entitlement but not to the actual figure. His answer was in the affirmative. I also asked Mr Han to confirm that it was his case that the deposit of RM270,000 was to be taken as the agreed damages. Again he reply in the affirmative.

It is clear to me that Mr Han had failed to read sub-cl (b) of cl 6 properly. It reads as follows:

> 6 Default by Purchaser
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> ...
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> (b) In the event of the Purchaser's failure to complete the sale as stated hereinbefore, the Purchaser shall remain liable for the payment of all such costs specified in Clause (14).

Clause 14 reads as follows:

> 14 Costs
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> (a) All costs of and incidental to this Agreement including the transfer and stamp duty thereon, registration fee and any additional stamp duty levied by the Stamp Office shall be borne and paid for by the Purchaser. The Purchaser further agrees to pay as and when required any additional or excess stamp duty and/or penalty that may be imposed by the relevant authority in respect of the agreement and the transfer of the said Land.
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> (b) The Vendor shall pay all filing fees or any charges payable on or incidental to the application of the consent to transfer with the relevant authorities. All costs and disbursements including the stamp duty and registration fees for the Discharge of Charge shall be borne and paid for by the Vendor.

It is a fact, not disputed by any affidavit in reply, that the state authority had agreed to renew the leasehold to the property provided that all the conditions stipulated thereunder were fulfilled amongst which was the condition that a sum of RM333,722 be paid to the state authority within three months from the date of the conditional approval. The plaintiff had

even taken the trouble to apply for an extension of this period. The plaintiff had in its affidavit annexed a copy of a letter from the Jabatan Tanah dan Galian Wilayah Persekutuan as well as the break up figures amounting to RM333,722. The defendant has not rebutted the facts as I have found since it had not filed any affidavit in rebuttal.

To my mind the conduct of the defendant is totally inequitable. The defendant must be estopped from denying the plaintiff its claim as, by a course of continuous conduct, the defendant had led the plaintiff to believe that it would honour its part of the bargain. The plaintiff went through the trouble of complying with all four conditions precedent stipulated in the agreement. It was clearly an implied term that if condition precedent (a) was to be fulfilled then the premium amounting to RM333,722 had to be paid. The plaintiff's conduct throughout has been irreproachable, whilst that of the defendant, reprehensible.

I therefore have no hesitation in granting the plaintiff order in terms of prayers (3), (4) and (5).

Application allowed.

Reported by Jafisah Jaafar